Supreme Court of the United States

OCTOBER TERM, 1921.

No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO AND ALBERT LACHMAN, AS EXECUTORS OF HENRIETTA S. LACHMAN, DECEASED,

Plaintiffs-in-Error,

versus

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,

Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF AMICI CURIAE OPPOSING RETROACTIVE CONSTRUCTION OF THE REVENUE ACT OF SEPTEMBER 8, 1916.

J. WALLACE BRYAN,
CHARLES McH. HOWARD,
AMICI CURIAE.

The Daily Record Print, Baltimore, Md.

INDEX.

PAGE

1. Introduction 1

2. Argument—The Act of September 8, 1916, Cannot Be Construed As Levying a Tax Upon the Estate of a Decedent in Respect of Irrevocable Transfers Made and Completed Prior To Its Passage, Even Though the Decedent Dies Subsequently 5

3. Conclusion 20

4. Appendix 21

TABLE OF CASES.

Cahen vs. Brewster, 203 U. S. 543.................. 19

Chanler vs. Kelsey, 205 U. S. 480.................. 8

Craft vs. Lofinck, 34 Kan. 365.................. 15

Curley et al. vs. Tait et al., 276 Fed. 840....2, 3, 11, 18, 21

Garfield vs. Bemis, 84 Mass. 445.................. 15

Gilbertson vs. Ballard, 125 Iowa 420, 2 Ann. Cas. 607 and note.................. 6

Gleason and Otis on Inheritance Taxation......... 7

Goldsmith vs. United States, 65 U. S. (L. Ed.)...... 9

Gould vs. Gould, 245 U. S. 151, 153.................. 5

Holt vs. Hendley, 232 U. S. 639.................. 13

Knowlton vs. Moore, 178 U. S. at 56..............8, 18

Matter of Seaman, 147 N. Y. 69.................. 7

Park vs. Whitney, 148 Mass. 276.................. 11

Pell, In re., 171 N. Y. 48; 57 L. R. A. 540.......... 7

Pettit, In re., 72 N. Y. Supp. 467; 2 Ann. Cas. 608 and Note 7

Seaman, Matter of, 147 N. Y. 69 7

Shay's Appeal, 51 Conn. 162 15

Shwab vs. Doyle, 269 Fed. 321 .... 2, 7, 17, 18

Society, Etc. vs. Wheeler, 22 Fed. Cas. 753 14

Southwestern Coal Co. vs. McBride, 185 U. S. 499 ... 12

Succession of Levy, In re., 115 La. 377; 8 L. R. A. (N. S.) 1180, and note 7

2 Sutherland on Statutes 6, 14

Twenty Per Cent. Cases, 87 U. S. 179 13

Union Pacific Railway Company vs. Laramie Stock Yards, 231 U. S. 199 .... 6, 12

Union Pacific Railroad Company vs. Snow, 231 U. S. 204-213 .... 12, 13, 20

United States vs. Field, 255 U. S. 257 .... 9, 16, 18

United States vs. Woodward, 65 U. S. (L. Ed.) 9

Wilson vs. Red Wing, Etc., 22 Minn. 488 14

Winfred vs. Northern Pacific Company, 227 U. S. at 302 12

1 Words and Phrases; 1st Series, 603; Ib. Second Series, 244 11

Wright vs. Blakeslee, 101 U. S. 174 .... 17, 19

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JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,

Defendants-in-Error.

In Error to the District Court of the United States for the Northern District of California.

BRIEF OF AMICI CURIAE OPPOSING RETROACTIVE CONSTRUCTION OF THE REVENUE ACT OF SEPTEMBER 8, 1916.

INTRODUCTION.

This brief is filed in support of the general proposition that the Revenue Act of September 8, 1916, imposing estate taxes should not be construed to levy on the estate of a decedent who died after the passage of the Act a

tax in respect of irrevocable transfers made, or trusts created, prior to its enactment.

The *amici curiae* have obtained leave to present this brief because the decision of this Honorable Court in the instant case will control, on the point of retroactive construction, the final decision in the case of CURLEY et al. vs. TAIT et al., 276 Fed. 840, now pending in the District Court for the District of Maryland. In that case, District Judge Rose has ruled that the Revenue Act of September 8, 1916, does not apply retroactively to such transfers made before it had been passed, and holds accordingly that no estate tax was chargeable against the estate of William H. Grafflin, late of Baltimore City, deceased, in respect of several gifts of securities made by Mr. Grafflin in his lifetime, and before the passage of the Act, to the Johns Hopkins Hospital and the Johns Hopkins University.

In reaching this conclusion, Judge Rose declined to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of SHWAB vs. DOYLE, 269 FED. 321, which case constitutes Number 200, October Term, 1921, on the docket of this Honorable Court, and has been assigned for argument at the same time with the instant case. The reasons for this decision are set forth in his opinion (printed in full as an appendix to this brief), which so forcibly presents the view that the Act of 1916 cannot be construed retroactively, and so clearly demonstrates the unsoundness of the lower Court's reasoning in SHWAB vs. DOYLE, that it merits the special attention of this Honorable Court. Furthermore, the facts in CURLEY vs. TAIT (supra) afford a striking example of the harsh and unjust consequences which would follow from giving the statute a retroactive construction as contended for by the Government; for not

only would the residuary estate of the donor be heavily penalized on account of irrevocable transfers made years before the statute was enacted, but the result would also be to levy a tax in respect of transfers made to a world-famous educational institution and hospital, in direct opposition to the present policy of Congress as declared in the Act of February 24, 1919.

The transfers in CURLEY vs. TAIT (supra) were several in number, and the Government claims that they are taxable as being "transfers intended to take effect in possession or enjoyment at or after his death" within the terms and application of the statute. The facts, as summarized in Judge Rose's opinion, are substantially as follows:

The first of these gifts was made February 1, 1910, and transferred 1,000 shares of the capital stock of the Consolidation Coal Company, valued at Mr. Grafflin's death at $109,500.00, to the Johns Hopkins Hospital in consideration of the latter's covenant to pay the net income received from the stock, after first paying taxes and deducting one per cent. of the income, unto Helen M. H. Kimball, who was then about to be married to William H. Grafflin, and who was in fact married to him shortly after the execution of the agreement, for and during her life, with a contingent right reserved to Mr. Grafflin to have the income for life should he survive her (which he did not), and thereafter the Johns Hopkins Hospital was to apply the securities and income to its own corporate purposes.

The other gifts were made September 22, 1913, November 30, 1915, and April 22, 1916. In each of them, the respective securities were transferred to the Johns Hopkins Hospital or the Johns Hopkins University, in con-

sideration of their respective covenants to pay the net income, after payment of taxes and certain other deductions, to William H. Grafflin during his lifetime, and after his death, to his wife, Helen M. H. Kimball Grafflin, if she survived him; and after the death of both of them, the Johns Hopkins Hospital and the Johns Hopkins University were authorized to apply the securities and income to their respective corporate purposes.

At the time of making these gifts, Mr. Grafflin was in sound health, and had no contemplation of death other than the general expectation thereof which all persons normally entertain. None of the transfers was or could have been made for the purpose of defeating federal estate taxes, since none had been laid or were contemplated. On the contrary, the transfer of February 1, 1910, was substantially an ante-nuptial settlement upon the donor's then intended wife and was made in consideration of the expected marriage; and the other gifts were also partly in the nature of settlements on his wife. It was expressly declared that it was not the intention of the donor to create a trust, and that the property was not to be charged with a trust, but that the entire title should pass immediately to the donees, subject to the obligation assumed by them under the contract of transfer to make the payments specified therein.

All of these gifts, which were absolute and irrevocable, were consummated by the immediate transfer on the books of the corporations concerned of the certificates for the respective shares to the Johns Hopkins Hospital and the Johns Hopkins University, and the latter thereafter appeared as sole and absolute shareholders of record, and exercised all of the rights of such shareholders, including the right to vote and to collect from the corporations concerned all dividends declared on

said shares. No dividends were in fact paid on the Roland Park Company stock embraced in the transfer of September 22, 1913, but such profits as the company earned before Mr. Grafflin's death were retained undistributed as an addition to surplus.

On these facts, which are undisputed, Judge Rose held that the transfers did not subject the estate of Mr. Grafflin (who died July 7, 1917) to an estate tax under the Act of 1916 in respect of these transfers made prior to the passage of the statute. The Government will appeal the case, but it is expected that no further action will be taken until the decision of this Honorable Court is announced in the case at bar.

ARGUMENT.

The Act of September 8, 1916, cannot be construed as levying a tax upon the estate of a decedent in respect of irrevocable transfers made and completed prior to its passage, even though the decedent dies subsequently.

It is well settled that statutes imposing special taxes must be construed strictly against the Government, and all doubt resolved in favor of the taxpayer. In the words of this Honorable Court:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are to be construed most strongly against the Government, and in favor of the citizen."
>
> Gould vs. Gould, 245 U. S. 151, 153.

Equally well established is the principle that all statutes are to be construed prospectively unless the language

used imperatively requires its retrospective application, especially when a retrospective construction would interfere with vested rights, or impose new obligations in respect of past transactions.

2 Sutherland on Statutes, page 1157.

In UNION PACIFIC RAILWAY COMPANY vs. LARAMIE STOCK YARDS, 231 U. S. 199, this Honorable Court said:

> "* * * A retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' Especially is this so where such construction may render the statute unconstitutional."

See also 2 Sutherland on Statutes, pages 640, 1157 et seq.

Citing the above case, Judge Rose tersely remarks:

> "* * * The courts have gone to great lengths in construing away language which in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage * * * ."

The rule against retrospective construction applies with full and special force to statutes imposing inheritance or succession taxes. Such statutes are uniformly construed prospectively whenever possible, and do not affect prior vested rights unless the contrary intention is distinctly expressed or clearly implied. The liability of the estate to such taxes is normally determined by the law in force at the time the transfer was made.

Gilbertson vs. Ballard, 125 Iowa 420.
2 Ann. Cass. 607 and notes.

Matter of Seaman, 147 N. Y. 69.
Gleason & Otis on Inheritance Taxation, 56-59.

Additional authorities in support of this principle are cited on pages 38-49 of the brief filed in the instant case on behalf of the plaintiffs-in-error; and on pages 64-73 of the brief filed on behalf of the plaintiff-in-error in Shwab vs. Doyle.

Statutes attempting to lay inheritance taxes on estates and interests which have already vested have been held unconstitutional, except in cases wherein the State still had control of the property for the purpose of administration and distribution.

In re. Succession of Levy, 115 La. 377; 8 L. R. A. (N. S.) 1180, and note.
In re. Pell, 171 N. Y. 48; 57 L. R. A. 540.
In re. Pettit, 72 N. Y. Supp. 469; 2 Ann. Cas. 608, note.
Gleason & Otis on Inheritance Taxation, 39-40.

Additional authorities in support of this rule are cited on pages 49-61 of the brief filed in the instant case on behalf of the plaintiffs-in-error; pages 78-109 of the brief filed on behalf of the plaintiff-in-error in Shwab vs. Doyle.

It follows, accordingly, that the Act of September 8, 1916, cannot be construed as taxing transfers made prior to its passage unless its language is so clear in its application to such antecedent transfers as to admit of no other possible construction. In case of doubt, the construction must be prospective.

In considering whether the clear terms of the Act of 1916 imperatively require a retroactive construction, it

is to be borne in mind that the Revenue Act of September 8, 1898, and all previous acts imposed what, for convenience, may be called "death duties,"—taxes on the succession, which are levied upon and borne by the share of the particular beneficiary whose succession is taxed, and *not* upon the residuary estate of the donor. This statement is based on the exhaustive opinion of Mr. Justice White in KNOWLTON vs. MOORE, 178 U. S. at 56, construing the Act of 1898.

But the case is otherwise where the taxing Act attempts to operate on *past* successions. In CHANLER vs. KELSEY, 205 U. S. 480, Mr. Justice Holmes (dissenting as to the nature of the tax in question) expressed the general principle in this way:

> "But if there is no succession, or if the succession has fully vested, or has passed beyond the dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the 14th Amendment would not allow. * * * I also repeat that it has no bearing on the matter that, by a different law, the State might have derived an equal revenue from these donees in the form of a tax."

This principle also finds expression in KNOWLTON vs. MOORE, where the constitutionality of the Revenue Act of 1898 was involved:

> "Confusion of thought may arise unless it is always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

And in the same case, the question arose as to whether the rate of the tax was to be determined by the amounts received by the beneficiaries or the amount of the entire

estate. The learned Justice, speaking for the majority, adopted the former view and suggested that the latter might be unconstitutional, in the following language (p. 77):

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below."

The tax imposed by the Act of 1916 is, by the Act itself, called an Estate Tax and is imposed "upon the transfer of the net estate of every decedent dying thereafter." See definitions by the Court in UNITED STATES vs. WOODWARD, decided June 6, 1921, and UNITED STATES vs. FIELD, decided February 28, 1921. In the latter case it is said:

> "The Revenue Act of 1916, in Section 201, imposes a tax equal to specified percentages of the value of the net estate 'upon the transfer of the net estate of every decedent dying after the passage of this Act.'"

The *amici curiae* respectfully submit that, except to the extent necessary for the prevention of evasion (compare the language in the automobile-forfeiture case—GOLDSMITH vs. UNITED STATES, decided January 17, 1921), Congress cannot consistently with due process of

law, by its mere *fiat*, include in the estate of a decedent interests in property with which he had lawfully and irrevocably parted years before there was any taxing Act to evade. And much less can Congress, consistently with due process and equality, impose upon the residuary legatee of a decedent dying after the passage of the Act, the entire burden, that is to say, an amount based not only on the net estate, but also on all settlements made by the decedent in past years. And furthermore, it will be noted that under the terms of the Act, the tax on these past transfers must be measured by the value of the property at the time of the decedent's death. This, conceivably (e. g., Bethlehem Steel or Northern Pacific shares, or real estate in which oil or minerals are found or which soars in value through a "boom") might be many times the value at the time of the prior settlement; and the result could easily be appalling in its injustice.

The Courts are especially averse to retrospective constructions which would inflict obvious injustice upon persons unable to protect themselves. And a retrospective construction of the Act of September 8, 1916, would open up limitless possibilities of mischief, extending in many instances to the complete subversion of the entire testamentary disposition made by a decedent in respect to the property owned by him at death, and involving in utter ruin the natural objects of his bounty. In the case, for example, of a person who had made large gifts for philanthropic or other purposes, it is quite possible that his entire residuary estate might be taken in satisfaction of estate taxes levied in respect of irrevocable transfers made years before the statute had been thought of, thereby reducing to wretched poverty the decedent's wife and children, without affording any means of compelling the actual beneficiaries of such antecedent transfers to contribute one penny toward the tax.

Even aside from such possibilities, every case in which an antecedent transfer is taxed involves the injustice of forcing one person to pay for a benefit enjoyed wholly by another person, and without prior warning or opportunity of self-protection. If it be said that transfers intended to take effect in possession or enjoyment after the donor's death must be taxed in order to prevent evasions of estate taxes, the obvious answer is that there could be no evasion of the law by a transfer made years before its passage, and that such evasions in the future will be effectively prevented by a prospective construction of the statute.

In the present case, it is not necessary to determine the constitutionality *vel non* of a law which, in inflexible terms, acts retrospectively. The Act of September 8, 1916, uses, in this connection, simply the words "at any time"; and these words are easily and properly susceptible of prospective operation. They do not necessarily import the limitless past as well as future. So an offer to buy stock "at any time" after a specified date does not import perpetual time, but only a "reasonable" time in which to complete the purchase. (Park vs. Whitney, 148 Mass. 276; 1 Wds. & Phs., 1st Series, 603; Ib. 2nd Series, 244).

Obviously, the phrase "at any time" may properly be construed as simply emphasizing the application of the statute to all transfers that occur during its effective period. It does not necessarily or imperatively—or even naturally—extend the effective period into the limitless past, contrary to all the normal presumptions and equities.

As was stated by Judge Rose in CURLEY vs. TAIT:

> " * * * These words, 'at any time,' however, are susceptible of a reasonable construction which could

limit them to transactions taking place thereafter.

"Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation usually implied that they were not to effect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so, 'antecedent rights are affected or human conduct given a consequence it did not intend.' Union Pacific Railroad Company vs. Snow, 231 U. S. 204-213."

Even against literal interpretation and apparent intention, Courts will deny to such a statute any retroactive operation when by so doing the character or quality of a past transaction is injuriously changed, and consequences are given to it contrary to the lawful intention of the parties at the time. In WINFRED vs. NORTHERN PACIFIC CO., 227 U. S. at 302, the Court denied a retroactive effect to the federal employers' liability Act, saying:

"It takes away material defenses. That none may exist in the present case, is immaterial. It is the operation of the statute which determines its character."

In SOUTHWESTERN COAL COMPANY vs. McBRIDE, 185 U. S. 499, the Act read (italics supplied): "From and after the passage of this Act, it shall be unlawful for *any* person to receive *any* royalty,"—on coal mined in the Choctaw nation. It was held that moneys due for prior royalties were collectible.

In UNION PACIFIC RAILWAY COMPANY vs. LARAMIE STOCK YARDS, 231 U. S. 199, the Supreme

Court held that an Act of Congress providing that "*in all instances* in which title * * * is claimed" should be construed prospectively, to apply only to claims arising *after* the passage of the statute.

The general rule is clearly stated by this Honorable Court in TWENTY PER CENT CASES, 87 U. S. 179, as follows:

> "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may hereafter arise, unless the language employed expressed a contrary intention in unequivocal terms."

In HOLT vs. HENDLEY, 232 U. S. 639, the Bankruptcy Act was amended so as to give the trustee the footing of any creditor in setting aside transfers by the bankrupt. The statute was held to be not retroactive:

> "Before that Act, Hold had a better title than the trustee would have got. We are of the opinion that the Act should not be construed to impair it. * * * We need not consider how far the constitutional power of Congress would have been limited."

In UNION PACIFIC RAILWAY COMPANY vs. SNOW, 231 U. S. 204, 213, one of the right-of-way squatter cases, the Court refused to give a retroactive effect to the Act of 1912 making State statutes of limitations applicable, in spite of its literal interpretation, saying:

> "And as we have pointed out, we are repelled from so doing by grave doubts as of its legality as well as of its justice."

Closely analogous is a case holding that an exemption of "*any* taxes" should be confined to taxes of the same general class as those described in the statute, and did

not carry an exemption from municipal taxes (2 Sutherland on Statutes, 723).

Indeed, if the words "has at any time" be construed literally, they would include *only* transfers made *prior* to the passage of the Act, and none made subsequently. This result would be manifestly absurd, and renders imperative the application of the rule of reason to determine what the statute really means. The door thus being open to construction, it is entirely proper to apply the ordinary rule against retrospective construction.

It is well settled that the use of the auxiliary verb "has" does not imperatively require that a statute containing it be construed retroactively to affect matters which had occurred prior to its passage. This principle is established in the following cases:

WILSON vs. RED WING, etc., 22 Minn. 488, involved an occupying claimant's Act providing for compensation for improvements made in ejectment "where any person * * * *has* peaceably taken possession of any land for which he has given a valuable consideration, or when any person *has* taken possession * * * under the official deed of any person or officer empowered by law," etc. This statute was held not retrospective so as to apply to improvements made before passage of the Act.

SOCIETY, ETC., vs. WHEELER, 22 Fed. Cas. 753, involved a similar statute of Vermont providing for compensation for improvements made "when any action shall be brought against any person for the recovery of any lands * * * which such person holds by virtue of a supposed legal title * * * and which the occupant * * * *has been* in the actual peaceable possession of for more than six years before the commencement of the ac-

tion. * * *" The Act was held not retrospective and hence inapplicable as to improvements made before the passage of the statute.

SHAY'S APPEAL, 51 Conn. 162, involved a statute providing: "Upon the death of any married woman intestate, leaving real estate in which her husband has no estate by the courtesy, but upon which he *has made* improvements during coverture with her consent * * * the value of such improvements shall constitute a valid claim against her estate," etc. It was held, that while the terms of the Act "are broad enough to include improvements prior to its passage," they are inapplicable to any such improvements made before its passage.

CRAFT vs. LOFINCK, 34 Kan. 365, involved a statute providing: "That where any portion of a township *has been*, or may hereafter be, detached and organized into another township, * * * since the vote upon which bonds were issued, such parts detached * * * shall be subject to taxation for the payment of principal and interest of such bonds * * *." The Court held the statute not to be retroactive so as to make liable a township for bridge bonds issued prior to the enactment.

GARFIELD vs. BEMIS, 84 Mass. 445, involved an Act providing "whenever any one has a claim against the estate of a deceased person, which has not been prosecuted within the time limited by law, he may apply to the Supreme Judicial Court, by bill in equity, setting forth the facts, etc." This Act was held not retroactive so as to permit the prosecution of a claim barred by the statute of limitations at its passage. The Court said:

> "For although it is so broad and comprehensive in its terms that it might embrace all cases, and apply to the past as well as to the future, yet there is noth-

ing in any of its provisions declaratory of the will of the legislature that it shall have a retroactive operation, or showing any necessity of so interpreting it. It will have complete effect if confined in its operation to cases arising subsequently to its enactment; its construction therefore must be in accordance with the general rule."

Conclusive evidence of the fact that the language of the Revenue Act of 1916 does not "imperatively demand" a retrospective construction is found in the amendment made in 1919, at the suggestion of the Bureau of Internal Revenue, by adding the words "whether such transfer or trust is made or created before or after the passage of this Act." Although the Government claims that this clause, which has frequently been used in other statutes to make clear the intention that an inheritance tax law shall operate retroactively, was inserted merely to clarify the statute, it is none the less an admission by the Department that such intention, if any existed, had been so ambiguously expressed as to require subsequent clarifying. This is simply another way of saying that the language of the Act of 1916 was doubtful in its application to transfers made before the passage of the Act, and this doubt must accordingly be resolved against the retrospective construction.

Directly in point is UNITED STATES vs. FIELD, 255 U. S. 257, holding that an intention that the Act of 1916 should apply to property passing under a general power of appointment could not be inferred from the amendment made in 1919 inserting a clause specifically including such property. This Honorable Court said:

"Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment. * * * The Government contends that the amendment was made for the

purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means. * * * It is evident, however, that this statement was based upon the interpretation of the Act of 1916, adopted by the Treasury Department; the same report proceeded to declare * * * that 'the absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax'; and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance."

In opposition to these settled principles, the Government relies upon the decision of the Circuit Court of Appeals for the Sixth Circuit in SHWAB vs. DOYLE, 269 Fed. 321. It is respectfully submitted that the decision in this case was clearly erroneous. In the first place, it is founded upon a mistaken premise. The lower Court erroneously assumes that the tax in question is a succession tax and payable by the beneficiary, and therein relies upon the case of WRIGHT vs. BLAKESLEE, 101 U. S. 174, which was *not* dealing with an estate tax payable out of the donor's residuary estate, but with a succession tax payable by the beneficiary of the succession.

In the second place, the learned Court in SHWAB vs. DOYLE has been overruled as to the proper inference to be drawn from the subsequent amendments of the Act of 1916. By the amendment of 1918, Congress attempted to enlarge the words "at any time," by inserting the words "before or after the passage of this Act." It was urged upon the Court in SHWAB vs. DOYLE that a similar amendment indicated a doubt as to the original intention; but the Court said that the change merely amounted to a *clarification* of the statute. Now (1) it is

submitted that the learned Court entirely misconceived the issue. A statute that needs clarifying will never be given a retroactive operation where the result would contravene one's fundamental notions of fairness and justice. And (2) the Supreme Court has since held that a similar amendment of the Act of 1916 (U. S. vs. Field, 255 U. S. 257) *did* show that Congress was in doubt as to the interpretation of the original statute.

In conclusion, the following passage from the opinion in CURLEY vs. TAIT is cited as entirely destructive of the lower Court's reasoning in SHWAB vs. DOYLE, and showing the practical hardships involved in such clear light as to render unthinkable a retroactive construction of the Act of 1916:

> "In Shwab vs. Doyle, supra, the case of Wright vs. Blakeslee, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession; that is, upon the right to receive, and was levied upon what passed to the heir, devisee, legatee, distributee or successor, and not upon the estate. Knowlton vs. Moore, 178 U. S. 41, 24, et seq. The distinction is neither pedantic nor technical, but as applied to the matter now in hand, is in the highest degree practical.
>
> In Shwab vs. Doyle, supra, it was held that the addition made by the Act of 1918 (40 Stat. 1097), of the words 'whether such transfer is made or occurred before or after the passage of the act,' was a legislative construction rather than an amendment of the statute now under consideration. The Supreme Court has since taken the opposite view, as to other broadening language then first introduced. U. S. vs. Field, 255 U. S.
>
> The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships

which a retroactive construction might entail by saying, 'It is true that if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death, say twenty-five years, to use plaintiff's suggestion, would be judiciously found to be made in contemplation of death under the legal definition applicable thereof, and without the aid of the two years prima facie provision.'

Apparently, the Court's attention was not drawn to some of the consequences which in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its Federal predecessor, is an estate tax and not a tax upon the right to receive. If the Government's contention be sustained, the tax will come, not as in Wright vs. Blakeslee, supra, or in Cahen vs. Brewster, 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of property going to Grafflin's widow. Would Grafflin have made any of these transfers had he understood by so doing he would impose a charge upon his wife of upwards of $23,600? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable. It is easy to conceive of a case in which a man of large estate might, before the passage of the Act of 1916, have made considerable transfers to relatives, friends or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the Government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to

suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. vs. Snow, supra."

CONCLUSION.

It is respectfully submitted that the Act of 1916 should not be construed as taxing a decedent's estate in respect of transfers made before the passage of the statute, and that the judgment of the lower Court construing it retroactively should be reversed.

Respectfully submitted,

J. WALLACE BRYAN,

CHARLES McH. HOWARD,

AMICI CURIAE.

Washington, April 10, 1922.

APPENDIX.

UNITED STATES DISTRICT COURT.

DISTRICT OF MARYLAND.

No. 1109—AT LAW.

Filed November 29, 1921.

JOHN J. CURLEY ET AL.

VS.

GALEN L. TAIT ET AL.

J. Wallace Bryan, Charles McHenry Howard and *Joseph C. France* for the plaintiffs.

Robert R. Carman for the defendants.

ROSE, D. J.—

The plaintiffs, as executors of the executrix of the late William H. Grafflin, who died July 7, 1917, are here seeking to recover $23,927.22 paid the defendant under protest as an estate tax upon $285,655, being the aggregate value, at the testator's death, of various securities transferred at different times, within seven and a half years before he died, to either the Johns Hopkins Hospital or the Johns Hopkins University. As neither institution was, in the view of the Government, to get any substantial benefit from the property until after the tes-

tator's death; the defendant says that the transfers were not intended to take effect in enjoyment until that time and that in consequence, the tax was properly collected.

The facts said to make the other securities taxable did not exist as to some Russian Roubles Internal 5s, worth, at the testator's death, $2,255. The inclusion by the Government of these in its tax charge appears to have been the result of some mistake or misunderstanding. They were given by Grafflin outright, and as neither they nor any of the other property invloved in this litigation was transferred in contemplation of death, the demurrer, so far as concerns the sum exacted upon them, must necessarily be overruled.

There are various minor differences in the terms of the transfers, but they were all alike in that by each of them, an out and out gift of the securities was made, and consummated by the issue and delivery of new certificates in the name of the grantee. It was expressly declared that the property conveyed was not charged with any trust. On the other hand, the hospital, or the university, as the case might be, covenanted in each of three agreements of transfer, that it would pay the net income during Grafflin's life to him, and after his death, and during such time as his wife should survive him, to her. After both of them were gone, the income, as well as the principal, was to be applied to the use of the grantee. The remaining one of the four, as it happened the earliest of them all in point of time, was in the nature of a marriage settlement. It recited that Grafflin was about to be married, and the hospital, with whom this particular agreement was made, covenanted to pay after the marriage was solemnized, the net income to the wife during her life, and afterwards to him during his life if he should prove to be the survivor.

APPENDIX (*Continued*).

By the terms of one of the agreements, the grantee, during the continuance of the life estate, was, after paying taxes, to retain 1 per cent. of the income for itself; by another $2\frac{1}{2}$ per cent.; and by the others 5 per cent., but in that case it was itself to pay the taxes, whether they amounted to more or less than the 5 per cent. retained.

By most of them it was provided that anything in the nature of stock or bond dividends or payments on account of cumulative preferred dividends then in arrear, should be treated as additions to principal. To the man in the street, the enjoyment of a share of stock would be found in the right to apply to his own uses the dividends that might be declared upon it, and from this standpoint there is so much force in the Government's contention that neither hospital nor university enjoyed their gifts during Grafflin's lifetime, that without further discussion, it may, for the purpose of this case, be assumed to be sound, although it will be unnecessary so to decide. Even so, and upon the further assumption to be hereafter critically examined, that the statute is retroactive covers these transactions entered into years before it was enacted, the query remains, was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the hospital, which covenanted to pay the net income thereof to the prospective wife during her life. Grafflin reserving nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor? The Government answers yes. It says that the hospital

was not to enjoy the stock until after his death. True, but is that all that is necessary?

If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and if to several, whether their enjoyment is to be simultaneous or successive, and if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, "the interest" which he retained for himself. At the time the transfer was made, it was uncertain whether it would turn out to be worth much, little or nothing. As he died before his wife, it proved to be a fact valueless. If its taxable worth is to be ascertained as of the date of his death, as is the clear statutory rule when applicable, there is nothing to tax. Of course, at the time the agreement was made, the retained interest had an ascertainable value to those concerns which deal in insurance policies, annuities and like interests, the worth of any one of which is altogether uncertain, but the aggregate value of any large number of which can, from the mortality tables, be determined with approximate exactness.

The question of how much a contingent interest as Grafflin retained for himself under this agreement should be valued for estate tax purposes is not at all clear.

APPENDIX (*Continued*).

Apparently what the statute had in mind in declaring that the value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, etc., is what it said. and no more. That is to say, the value of the property is to be then determined as of that date and not his interest in it, for if the latter were the case, any property which had been transferred by him in such manner that his interest ceased at death, would have no taxable value, and that is clearly that the statute does not mean.

At the hearing the Government was so confident that it was entitled to tax the full value of his interest and the plaintiffs so certain that none of it should be taxed, that neither of them discussed the question now mooted. As from what has been said it follows that the entire interest was not taxable, the demurrer to so much of the plaintiff's declaration as seeks to recover the tax exacted on all of it, must be overruled. The question of whether the Government was entitled to any part of the tax less than the whole need not be passed upon and should not be until the Court is enlightened by further argument.

All the above will be unimportant if the conclusion to which I have arrived upon another contention of the plaintiffs shall ultimately be sustained. They say that no tax at all was collectable, because the transfers here in controversy were all made before the statute was enacted. To this the Government has two answers. It says that the statute itself declares that it has reference to a transfer made "at any time." These words, however, are susceptible of a reasonable construction which could limit them to transactions taking place thereafter.

APPENDIX (*Continued*).

Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation usually implied that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so, "antecedent rights are affected or human conduct given a consequence it did not intend." Union Pacific Railroad Company vs. Snow, 231 U. S. 204-213.

For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. Union Pacific R. R. Co. vs. Laramie Stock Yards Co., 231 U. S. 190. If this were a case of first impression, I personally would have no hesitation whatever in holding that the Act of 1916 does not affect transfers made before it was passed.

But the Government says in the second place, that in Shwab vs. Doyle, 269 Fed. 321, the Circuit Court of Appeals for the Sixth Circuit held the act to be retroactive. Diversity of decision is especially unfortunate in the construction of tax statutes in which uniformity of interpretation and application are so important. Moreover, a court of equal rank would hesitate long before differing with a tribunal so eminent for wisdom and learning as that which has spoken on the subject. Nothing short of

APPENDIX (*Continued*).

the clearest conviction will justify a district judge in doing so, but there are rare occasions in which he must, because as the law does not make a decision of a Circuit Court of Appeals binding outside of its own circuit, the responsibility of determination is one from which he cannot escape.

In Shwab vs. Doyle, supra, the case of Wright vs. Blakeslee, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession; that is, upon the right to receive, and was levied upon what passed to the heir, devisee, legatee, distributee or successor, and not upon the estate. Knowlton vs. Moore, 178 U. S. 41, 24 et seq. The distinction is neither pedantic nor technical, but as applied to the matter now in hand, is in the highest degree practical.

In Shwab vs. Doyle, supra, it was held that the addition made by the Act of 1918 (40 Stat. 1097), of the words "whether such transfer is made or occurred before or after the passage of the act," was a legislative construction rather than an amendment of the statute now under consideration. The Supreme Court has since taken the opposite view, as to other broadening language then first introduced. U. S. vs. Field, 255 U. S.

The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships which a retroactive construction might entail by saying, "It is true that if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practi-

cal. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death, say twenty-five years, to use plaintiff's suggestion, would be judicially found to be made in contemplation of death under the legal definition applicable thereof, and without the aid of the two years prima facie provision."

Apparently, the Court's attention was not drawn to some of the consequences which in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its Federal predecessor, is an estate tax and not a tax upon the right to receive. If the Government's contention be sustained, the tax will come, not as in Wright vs. Blakeslee, supra, or in Cahen vs. Brewster, 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of property going to Grafflin's widow. Would Grafflin have made any of these transfers had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable. It is easy to conceive of a case in which a man of large estate might, before the passage of the Act of 1916, have made considerable transfers to relatives, friends or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee, a comfortable and even handsome balance of his estate. If the Government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more

than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. vs. Snow, supra.

It follows that the demurrer to the declaration must be overruled generally.